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No. 97-

In the Supreme Court of the United States

OCTOBER TERM, 1997

JAMES W. CILECEK, M.D.,
Petitioner,

v.

INOVA HEALTH SYSTEM SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS of NORTHERN VIRGINIA, Ltd. and THOM A. MAYER, M.D.

Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fourth Circuit, in conflict with decisions of this Court and recent decisions of the Ninth and Eleventh Circuits, erred in holding that, because an emergency room physician had agreed to be labeled an "independent contractor," he was not an employee protected by Title VII, even though the hospital exercised control over his activities identical to the control it exercised over physicians it called "employees."

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James W. Cilecek, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A1 - A21) is reported at 115 F.3d 256. The district court's decision from the bench (App., *infra*, A27 - A28) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1997. App., *infra*, A22 - A23. A timely petition for rehearing was denied on August 5, 1997. *Id.* at A24 - A25. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Title VII defines "employer" as: "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." *Id.* § 2000e(b). Title VII defines "employee" as: "an individual employed by an employer . . . ." *Id.* § 2000e(f).

STATEMENT OF THE CASE

1. For more than ten years, Dr. James Cilecek worked full time as an emergency room physician at two facilities owned by Inova Health Systems Services, Fairfax Hospital and ACCESS of Reston. App., *infra*, at A2 - A3. He was a house physician on the staff. *Id.* at A16. He had no private

practice; he treated only hospital patients, in hospital facilities, using hospital equipment. *Id.* at A16 - A17, A20. Under the hospital's by-laws, he and all other emergency room doctors were required to perform their responsibilities "at the direction and under the supervision of the chairman of the clinical department to which the individual has been assigned." *Id.* at A17. The chairman of the Department of Emergency Medicine, Dr. Thom Mayer, had the power to enforce the compliance of all emergency room doctors with the hospital's rules and regulations through supervision, suspension, and even termination. *Id.*

2. Since 1989, respondent Emergency Physicians of Northern Virginia ("Emergency Physicians") has supplied emergency room physicians to Inova. App., *infra*, A2. Dr. Mayer, chairman of Emergency Medicine at the hospital, is also the president and sole owner of Emergency Physicians. After Emergency Physicians' entry on the scene, Dr. Cilecek continued to work at the hospital and for ACCESS. *Id.* The terms and conditions of his responsibilities remained the same, but Emergency Physicians now provided his paycheck and malpractice insurance. *Id.* at A17. He agreed to be called an "independent contractor," and he paid his own Social Security and estimated taxes. For most of his tenure at Inova, and for a full two years immediately preceding his termination in October 1994, Dr. Cilecek worked full time and exclusively for Inova. *Id.* at A3.

3. While some Inova emergency room doctors are called employees and others are called "independent contractors," they all do the same work, are subject to the same rules and regulations, and attend the same meetings. App., *infra*, A20. All,

including Dr. Cilecek, report to and are controlled and supervised by Dr. Mayer, whose only office is in the hospital. *Id.* at A19 - A20. All emergency room doctors, including Dr. Cilecek, submit proposed work schedules, which are either approved or altered by the hospital. *Id.* at A20. Dr. Cilecek attested that no differentiation among doctors exists in the workplace in standards, supervision, or work performed. *Id.* at A19 - A20.

4. By early 1994, it was common knowledge among Inova workers that a former employee had brought Title VII claims of discrimination, harassment, and retaliation against Inova. J.A. at 141.[1] In February 1994, Dr. Mayer warned Dr. Cilecek not to help anyone complaining about Inova. J.A. 141 ¶ 13. In early July 1994, Dr. Cilecek executed an affidavit for the plaintiff in the Title VII suit. J.A. 142 ¶ 14, 153-56. Within weeks, Dr. Cilecek received a subpoena for a deposition by Inova and received notice that the hours in his schedule for the upcoming month had been cut. App., *infra*, at A4. When Dr. Cilecek protested the cut, Dr. Mayer fired him. *Id.*

5. On October 12, 1995, Dr. Cilecek filed suit against the hospital and Emergency Physicians in the United States District Court for the Eastern District of Virginia.[2] App., *infra*, A4. The complaint alleged wrongful retaliatory discharge in violation of Title VII. *Id.* at A4 - A5.

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1 "J.A." refers to the Joint Appendix that was filed in the Fourth Circuit.

2 The district court's jurisdiction rested on 28 U.S.C. § 1331.

The defendants moved for summary judgment, which the district court granted without permitting Dr. Cilecek any discovery. The court's ruling was based on its determination that Dr. Cilecek was an independent contractor rather than an employee, and therefore not protected by Title VII. App., *infra*, at A27 - A28, A5 - A6. Dr. Cilecek argued that he was an employee of the hospital or of Emergency Physicians, or of both as joint employers. In ruling from the bench, the district court relied primarily on the fact that all parties had referred to Dr. Cilecek as an independent contractor, and that he was treated as such for tax purposes.

6. The United States Court of Appeals for the Fourth Circuit affirmed. App., *infra*, at A15.[3] A divided panel held that whether Dr. Cilecek was an "independent contractor" or an "employee" was a question of law. *Id.* at A11. The panel recognized that under this Court's long established standard, employed uniformly by other circuits, the distinction between employee and independent contractor "rests on the degree of control exercised by the hiring party" (*Id.* at A9), but viewed it as "less productive to debate the control over the discharge of professional services in the medical context" than in other contexts. *Id.*

Thus, dismissing this Court's test for determining employment status, the majority selected certain factors that it viewed as "core incidents to a work relationship that are inconsistent with employee status," while recognizing that other factors in the record "indicat[ed] otherwise." *Id.* at A11 - A12. Its

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[3] The jurisdiction of the court of appeals rested on 28 U.S.C. § 1291.

calculus did not mention that Dr. Cilecek had no independent business of his own, but only worked doing the business of the hospital, nor did it address the evidence that on the job, Dr. Cilecek did exactly the same work as and was indistinguishable from any other emergency room physician, whether "employee" or "independent contractor." *Id.* at A19 - A20. (Murnaghan, J., *dissenting.*) Refusing to apply the test that would have prevented summary judgment on this fact-disputed record, the court instead employed a new legal standard: the majority deemed "important to [its] conclusion" that the parties had agreed that Dr. Cilecek would be an "independent contractor." *Id.* at A14.

Judge Murnaghan dissented. He protested that the governing legal standard dictates that the agreement of the parties "cannot overcome the actual facts," which were that Dr. Cilecek worked essentially full time, at a set hourly rate, and that Emergency Physicians would pay him and supply his malpractice insurance. App., *infra,* at A17. While using the wrong legal standard, the majority had "usurp[ed] the role of the factfinder and resolve[d] disputed factual issues" in the hospital's favor. *Id.* at A21. Judge Murnaghan examined all of the factors identified by this Court and other courts as determinative of employment relationship, and he concluded that "[a] majority of those factors points to Dr. Cilecek as an employee." *Id.* at A19.

7. Dr. Cilecek petitioned for a rehearing en banc on June 14, 1997. On August 5, 1997, the Fourth Circuit denied the petition. The United States and the Equal Employment Opportunity Commission as *amicus curiae* supported Dr. Cilecek's position both on appeal and on rehearing. They argued that the panel's

creation of a new Title VII exclusion in the medical context "improperly narrows the reach of Title VII," and "frustrate[s] Congress's remedial purpose in enacting Title VII to protect workers from discrimination." (Amicus Brief on Rehearing at 7.)

REASONS FOR GRANTING THE PETITION

Introduction

The Fourth Circuit has held that, because the hospital and Dr. Cilecek agreed that he would be called, and treated for tax purposes as, an "independent contractor," he was not an "employee" protected by Title VII. In giving virtually conclusive weight to that agreement between the parties, the decision conflicts squarely with recent decisions of the Ninth and Eleventh Circuits, which held that a contractual arrangement structured to avoid creating an employment relationship will not overcome the realities of the workplace.

The majority ignored or transfigured the factor that this Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), treated as the most significant indicator of employee status: "the hiring party's right to control the manner and means by which the [work] is accomplished." *Id.* at 323. The majority compounded its error by usurping the province of the jury in granting summary judgment, and, even more egregious, did so without permitting any discovery. This too is in conflict with other circuits, which have held that the fact-intensive question of employment relationship is inappropriate for summary judgment.

As the United States and the EEOC forcefully argued in support of Dr. Cilecek's petition for rehearing, this case is one of "exceptional importance." (Amicus Brief on Rehearing at 1.) The majority's decision, said the United States, "improperly narrows the reach of Title VII and permits employers to avoid their Title VII responsibility for certain employment functions, such as payroll and shift scheduling, while retaining actual direction and control of the employees' work." *Id.* at 7. The government also stressed in its earlier brief on appeal that because the term "employee" is common to so many statutes, a decision to affirm the district court would reach far beyond the boundaries of Title VII. (Amicus Brief on Appeal at 17.) This case thus presents an issue of great public importance. For that reason, and because the decision is in conflict with those of other circuits, this Court's review is warranted.

I. THE MAJORITY'S DECISION GIVING DECISIVE WEIGHT TO THE PARTIES' AGREEMENT CONFLICTS WITH RECENT DECISIONS OF THE NINTH AND ELEVENTH CIRCUITS, WHICH PROPERLY OBSERVE THIS COURT'S RULE REJECTING LABELS AS DETERMINATIVE OF EMPLOYMENT STATUS

This Court has long held that in determining who is an "employee" under a variety of federal statutes, the courts must examine what work is actually done and how it is controlled. Merely labeling a worker "independent contractor" will not suffice. "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the

protection of the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). [4] In *Rutherford Food Corp.*, the Court was interpreting the term "employee" under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.*, which, like Title VII and other federal statutes, defines "employee" in a circular fashion as "an individual employed by an employer."

Courts have routinely followed this Court's directive to look beyond labels to the actual realities of the workplace. In fact, the Ninth and Eleventh Circuits, interpreting the same statutory term, have recently held that even a clear contractual agreement to establish an "independent contractor" status will not overcome the realities of the workplace. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) ("employee" under the Employee Retirement Income Security Act of 1974 ("ERISA")), and *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256 (11th Cir. 1997) ("employee" under the Age Discrimination in Employment Act (ADEA)). As Judge Murnaghan noted in dissent in the Fourth Circuit, the agreement between the parties that the doctor be "deemed an independent contractor . . . cannot overcome the actual facts." App. at A17.

Over the past fifty years, this Court has construed the term "employee" under many federal social welfare statutes sharing the common circular definition.[5] Most recently, in *Nationwide Mutual*

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[4] *See Hishon v King & Spalding*, 467 U.S. 69, 80 n.2 (1984) (Powell, J., concurring) (". . . an employer may not evade the strictures of Title VII simply by labeling its employees 'partners'").

[5] *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 323 (meaning of "employee" under Employee Retirement Income Security Act); *Kelley v. Southern Pac. Co.*, 419 U.S. 318, 321-26 (1974)

Insurance Co. v. Darden, this Court interpreted the meaning of "employee" under ERISA. 503 U.S. at 323. In *Darden*, this Court held that where a federal statute does not define the term "employee," courts should presume the term to incorporate traditional common law principles of agency, under which control is the key factor. *Id.* This Court explained that "'[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.'" *Id.*, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).[6] Although this Court has recently addressed related issues under Title VII,[7] it has never construed the term "employee" for purposes of Title VII. Many courts have, however, looked to the *Darden* decision to

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(same under the Federal Employers Liability Act); *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968) (same under the National Labor Relations Act, as amended); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-30 (1947) (same under the Fair Labor Standards Act).

6 The Court also listed twelve other factors to consider, no one of which is determinative; all of those factors except tax treatment militate in favor of Dr. Cilecek's "employee" status. *Nationwide Mut. Ins. Co.*, 503 U.S. at 323-24. *See infra*, at n.11.

7 This Court addressed two related issues in the 1996 term. In *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997), this Court held that the term "employees," as used in § 704(a) of Title VII, includes former employees, and in *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660 (1997), this Court held that under § 2000e(b) of Title VII, which defines an employer as one who has fifteen or more employees for each working day for twenty or more weeks during the calendar year, the crucial factor is whether or not the employer has employment relationships with 15 or more individuals and not whether 15 or more individuals merely appear on the payroll.

analyze an individual's status under Title VII. *See, e.g., Lambertsen v. Utah Dep't of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996).

The Fourth Circuit majority misinterpreted *Darden*, in conflict with the decisions of other courts of appeals. It held that the parties' agreement that Dr. Cilecek would be called an "independent contractor," and would pay his taxes accordingly, meant that he was not an "employee" for purposes of Title VII, even though he performed on the job and was supervised and controlled in the same way as the so-called "employee" emergency room physicians. In so doing, the Fourth Circuit turned the *Darden* test on its head and set dangerous precedent that will have significant negative implications for the increasing number of professionals who, like Dr. Cilecek, might be labeled "independent contractors," but are, as a matter of workplace reality, "employees."

In contrast, the 9th and 11th Circuits have recently held that such an agreement between the parties will not control when the workers function like employees. *See Vizcaino v. Microsoft Corp., supra* and *Garcia v. Copenhaver, Bell & Assocs., supra*. The Eleventh Circuit case, brought under the Age Discrimination in Employment Act, a sister statute of Title VII, also involved an emergency room doctor who, like Dr. Cilecek, worked for a corporate provider of hospital emergency room physicians. The contract between the doctor and the corporation explicitly provided that the doctor was to perform his duties "as ***an independent contractor and not as an employee***," and that nothing in the contract should "be construed to create" any "relationship between the parties ***other than an independent contractor relationship***." *Garcia v.*

Copenhaver, Bell & Assocs., 104 F.3d at 1258 (emphasis in original). Under the contract, the corporation was to exercise no control over the means or manner in which the doctor performed his duties, which were to be performed in accordance with his "independent medical judgment." *Id.*

Notwithstanding this very explicit agreement between the parties *not* to create an employment relationship, the Eleventh Circuit held that the question of whether the doctor was an employee must be submitted to the jury. The contract, explicit as it was, was not dispositive of the employment relationship question. *Id.*

The Ninth Circuit, sitting en banc, has also held, directly contrary to the Fourth Circuit, that an agreement between the parties to call workers "independent contractors" does not render them non-employees. In *Vizcaino v. Microsoft Corp., supra*, an ERISA case, the court held that Microsoft workers who had signed contracts defining them as "independent contractors" and not "employees" were nonetheless employees under the law. They "did not give up or waive their rights to be treated like all other employees under the [company's pension and welfare] plans." *Vizcaino v. Microsoft Corp.*, 120 F.3d at 1011-12. Despite the contract designation as "independent contractor," the explicit intention *not* to create an employment relationship, and the fact that Microsoft plaintiffs were responsible for their own taxes and benefits, Microsoft had "fully integrated [the plaintiffs] into its workforce," treating them in reality like employees. *Id.* at 1008. As a result of this treatment, the plaintiffs had to be regarded as employees under the statute.

These two cases are in accord with many decisions of this Court and the courts of appeals holding that the label given to the hired party is not controlling.[8] Some courts have even held that the label is meaningless. *See, e.g., Eastern Inv. Corp. v. United States*, 49 F.3d 651, 655 (10th Cir. 1995) ("the law is clear that Lowen's classification of a salesperson as employee or independent contractor is of no consequence . . ."). This is because the label given to the hired party "does little to illuminate the actual nature of [the]

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[8] *See Rutherford Food Corp. v. McComb*, 331 U.S. at 729 ("[w]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards] Act"); *Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 232 (2d Cir. 1995) ("the employment status of an individual for the purposes of ERISA is not determined solely by the label used in the contract between the parties"); *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992) (status of "employee" under FLSA depends on totality of circumstances "rather than on any technical label"), *cert. denied*, 507 U.S. 928 (1993); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 81 (8th Cir. 1996) ("The actual duties and role of the individual govern [whether an individual is an "employee" under Title VII]. An employer may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship."), *cert. denied*, 117 S. Ct. 1694 (1997); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993) ("[t]he employment status of an individual for the purposes of ERISA is not determined by the label used in the contract between the parties"); *see also Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("an employer's self-serving label of workers as independent contractors is not controlling . . ."); *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982) ("[a] determination of whether an individual is an employee and therefore covered by the protections in ADEA should not center on the label which the organization has chosen to give to the position"), *cert. denied*, 464 U.S. 819 (1983).

employment relationship . . . ." *Simpson v. Ernst & Young*, 100 F.3d 436, 439 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1862 (1997). In a variety of contexts, this Court and the courts of appeals have recognized that if weight were placed on what a worker is called and how he pays his taxes, a company could easily circumvent the requirements of Title VII and other federal remedial and revenue statutes by labeling its workers something other than "employees." As the United States and the EEOC explained in their Amicus Brief, civil rights statutes such as Title VII "are remedial in nature and should be construed broadly to effectuate their statutory purposes." (Amicus Brief on Appeal at 16-17, citations omitted.) An artificial constriction of the definition of "employee" violates that principle. Indeed, this Court recently construed the term "employees" as used in § 704(a) of Title VII broadly to include former as well as current employees. *See Robinson v. Shell Oil Co.* 117 S. Ct. 843 (1997).

Thus, the actual incidents of the working relationship, and not the label given to the hired party, determine the party's status; a party cannot even waive the protection provided by federal remedial statutes merely by agreeing to be called an "independent contractor." *Vizcaino v. Microsoft Corp., supra; Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) ("an employee's rights under Title VII may not be waived prospectively"); *see also Mukhtar v. Castleton Service Corp.*, 920 F. Supp. 934, 938 (S.D. Ind. 1996) ("parties cannot agree to waive otherwise applicable protection provided by acts of Congress" and "even though the parties may have labelled their relationship in one way, their labels do not control if enough of the indicia of an employment relationship are present").

The Fourth Circuit's emphasis on the parties' "mutual intent to create an independent contractor relationship" as the first of the "most relevant" factors (App. at A15, A11), is contrary to settled law that these rights may not be waived. Such an intent, far more clearly established in the *Microsoft* and *Garcia* cases than in the instant case, was rejected by the Ninth and Eleventh Circuits, respectively, when the workplace realities showed an employment relationship.

A corollary of the argument that labels are not determinative is that all relevant factors must be examined and weighed, and that this fact-intensive task belongs to the jury. Most courts have treated the employment relationship question as the Eleventh Circuit did in *Garcia v. Copenhaver, Bell & Assocs., supra,* ruling that the question requires weighing and sifting many factors, and is simply not appropriate for summary judgment.[9] The decision below directly conflicts with those numerous decisions.

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9 In *Garcia v. Copenhaver, Bell & Assocs., supra,* the 11th Circuit reversed the district court's decision to dismiss plaintiff's complaint for lack of subject matter jurisidiction where the facts concerning whether or not defendant was "employer" was an element of plaintiff's ADEA claim and there were disputed facts about whether plaintiff was "employee" of defendant. *See also Mallare v. St. Luke's Hosp.,* 699 F. Supp. 1127 (E.D. Pa. 1988) (whether doctor in medical residency program was an employee of the hospital was not a matter for summary judgment where there were facts that both supported and weighed against finding an employment relationship); *Sharkey v. Ultramar Energy Ltd., supra* (court reversed district court's decision to grant defendants' motions for summary judgment where employment status of individual for purposes of ERISA is fact intensive inquiry, not determined solely by label used in contract and could not be properly determined on summary judgment); *Gonzalez v. Trinity*

The majority compounded its error by granting summary judgment before Dr. Cilecek had the opportunity to obtain any discovery. Were summary judgment ever appropriate on the question of employment relationship, it is well established in many circuits that "granting summary judgment prior to the completion of all discovery is inappropriate."[10] Here, Dr. Cilecek had sought discovery, but he had not obtained any responses.

Marine Group, Inc., 117 F.3d 894, 899 (5th Cir. 1997) (in denying plaintiff's motion for summary judgment on issue of whether plaintiff was "employee" within the meaning of Title VII, district court explained that the determination "'requires a factual analysis of often conflicting allegations'" and therefore the "'issue is not amenable to summary judgment at this time'"); *Folkerson v. Circus Circus Enters., Inc.*, No. 93-17158, 1995 U.S. App. LEXIS 30137 (9th Cir. Oct. 16, 1995) (district court improperly granted summary judgment for defendant on plaintiff's Title VII claim on ground plaintiff was independent contractor where evidence indicated defendant exercised control over plaintiff's work); *Daughtrey v. Honeywell, Inc.*, 3 F.3d at 1493 (reversed district court decision to grant summary judgment for defendants on plaintiff's ERISA claim where facts were disputed on pivotal issue of degree of control exercised by Honeywell over plaintiff).

[10] *Phillips v. General Motors Corp.*, 17 Fed. R. Serv. 3d (Callaghan) 962, 968 (4th Cir. 1990); *see also Vance ex rel. Hammons v. United States*, 90 F.3d 1145 (6th Cir. 1996) (reversing district court decision to grant summary judgment where nonmovant did not have the opportunity to complete discovery); *Kachmar v. Sungard Data Sys.*, 109 F.3d 173 (3d Cir. 1997) (vacating district court decision to grant summary judgment in Title VII case where nonmovant did not have the opportunity to complete discovery); *Meloff v. New York Life Ins. Co.*, 51 F.3d 372 (2d Cir. 1995) (vacating district court decision to grant summary judgment where nonmovant did not have ample opportunity for discovery); *Snook v. Trust Co. Bank, N.A.*, 859 F.2d 865 (11th Cir. 1988) (same).

Even if the panel were correct to decide the employment relationship question, rather than submitting it to a jury, the panel was obligated to weigh *all* of the relevant factors and, of course, to read them in the light most favorable to the plaintiff. *See, e.g., Frankel v. Bally, Inc.*, 987 F.2d 86 (2d Cir. 1993) (reversing decision to grant summary judgment in favor of defendant on ADEA claim for failing to examine all factors concerning the "employment" relationship). Instead, as Judge Murnaghan pointed out in dissent, the panel "resolve[d] disputed factual issues" against Dr. Cilecek, making summary judgment "inappropriate and ill advised." App. at A21. The panel arrogated to itself the jury's fact finding and weighing function, and, in doing so, violated the well-established principle that all permissible inferences must be weighed in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1968).

The circuit courts agree in the wake of *Darden* that the most important factor in the analysis of the working relationship is the degree of control exercised by the hiring party over the hired party.[11] The panel

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[11] *See Frankel v. Bally, Inc.*, 987 F.2d at 90 (the most significant factor in determination of whether individual is "employee" or "independent contractor" is the hiring party's right to control the manner and means by which the work is accomplished); *Simpson v. Ernst & Young*, 100 F.3d at 442 (*Darden* "defines the underlying common denominator of the employer/employee rubric as the employer's ability to control job performance and employment opportunities of the aggrieved individual as the most important of many elements to be evaluated . . ."); *Loomis Cabinet Co. v. Occupational Safety & Health Review Comm'n*, 20 F.3d 938, 942 (9th Cir. 1994) (under *Darden* the "central inquiry is: who controls the work environment"); *Lambertsen v. Utah Dep't of Corrections*, 79 F.3d at 1027 ("the critical feature which defines the employer-

majority paid lip service to that factor, but it simply chose to emphasize instead the parties' intention "to establish an independent contractor relationship." App. at A14 - A15. Indeed, but for the tax treatment, *all* of the other factors that this Court set forth in *Darden* as relevant to the employment relationship question demonstrate that Dr. Cilecek was an employee.[12]

Finally, the Fourth Circuit majority minimized the important factor of workplace control by suggesting, without record support, a new rule for reviewing the degree of control in a medical setting. Contrary to the Eleventh Circuit's approach in *Garcia v. Copenhaver, Bell & Assocs., supra*, it took what amounted to judicial notice of a supposed tension in the medical setting between the hospital and the doctor, declaring that "it is less productive to debate the control over the discharge of professional services in the medical context than it might be in other service relationships." App. at A9.

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employee relationship between plaintiff and defendant . . . is control"); *Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d at 1266 ("the central issue . . . is the 'hiring party's right to control the manner and means by which the [work] is accomplished'") (quoting *Daughtrey v. Honeywell, Inc.*, 3 F.3d at 1495-96, citing *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751).

12 The record clearly shows the following: all emergency room doctors had the same skills and did the same work; all work was done in the hospital, doing the hospital's regular business, with the hospital's tools, equipment, personnel, and patients; the relationship was of ten years' duration; the doctor was paid by the hour, not by the job; and he received malpractice insurance. He could not work when and as he pleased, but rather had to work at least 100 and up to 180 hours per month, depending on the hospital's needs. App. at A2 - A3; A16 - A17; A19 - A20.

The Fourth Circuit reasoned that it was appropriate to ignore the hospital's pervasive workplace control because the hospital had to exercise control over all physicians on its staff in order to avoid exposing itself to liability. App. at A9. That analysis, however, missed the point: the fact that employers have the need to exercise more control over their employees than over independent contractors is precisely why courts consider *control* to be evidence of an employment relationship.

The Fourth Circuit created what amounts to a new rule that doctors, and perhaps other professionals, should be subject to more stringent standards for purposes of determining whether they are entitled to protection under Title VII. This new rule is a radical departure from established jurisprudence, for no court has held professionals to a more stringent standard of eligibility for protection under federal remedial statutes. *See Simpson v. Ernst & Young*, 100 F.3d at 443 (Sixth Circuit applied the same common law test emphasizing evidence of control and held that despite being labeled a "partner," plaintiff was an "employee" for purposes of ERISA and the ADEA) and *Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d at 1267 (Eleventh Circuit focused on control defendant exercised over plaintiff, an emergency physician). Indeed, there is no justification for doing so.

The Fourth Circuit offered no legal authority or other compelling policy reason to support its decision that those who hire certain professionals should be immune from liability under Title VII and other federal remedial statutes. Without further guidance from this Court, professionals in particular are at a great risk of

being denied the protection to which they are entitled under federal legislation.

II. THE MAJORITY'S DECISION WOULD ELIMINATE REMEDIES FOR LARGE NUMBERS OF WORKERS HERETOFORE PROTECTED BY A VARIETY OF FEDERAL STATUTES

In addition to the enforcement of Title VII, at issue here, the decision of the court below will affect the reach and enforcement of a number of other statutes that rely on the common law definition of employee.[13] This Court has held consistently that the determination as to whether one is an employee under such statutes is made according to common law principles and "must be based on an examination of the totality of the circumstances." *Nationwide Mut. Ins. Co.*, 503 U.S. at 322-24; *see, e.g., Simpson v. Ernst & Young, supra,* (nominal "partner" held to be an "employee" under the ADEA because he had no meaningful participation in the ownership or control of the business); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961) (members of a cooperative were employees for

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[13] These include the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*, the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.*, and the Internal Revenue Code, 26 U.S.C. §§ 1 *et seq.*

purposes of the FLSA because they functioned in the work place and were paid like employees).[14]

In addition to the adverse impact on the enforcement of these statutes, the Fourth Circuit's decision is likely to affect the administration of the Internal Revenue Code. The Code explicitly references the common law definition of "employee,"[15] which is crucial to the Internal Revenue Service's determination of an employer's responsibility for withholding taxes under Federal Insurance Contribution Act and other types of employer duties. *See* Rev. Rul. 87-41, 1987-1 C.B. 296. For tax purposes, as with all of the remedial statutes cited above, whether a person is an employee or an independent contractor is a question of fact and is decided only after consideration of all of the particular circumstances of each case. *Ravel v. Commissioner*, 26 T.C.M. (CCH) 885 (1967).[16] Accordingly, the presence or absence of labels is not decisive. *Id.* The Fourth Circuit's decision would invite employers to classify

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14 *See generally* Lewis Maltby & David Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C.L.Rev. 239.

15 The Internal Revenue Code provides that the term "employee" includes "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." 26 U.S.C. § 3121(d)(2).

16 In pertinent part, Treas. Reg. § 31.3401(c)-1 provides that an employer-employee relationship "exist[s] when the person for whom services are performed has the right to control and direct the individual who performs the services." *Id.* at (b). The IRS also examines whether the person possessing control has the right to discharge the hired individual, furnishes the tools, or provides a workplace. *Id.*

workers as "independent contractors" and thus avoid their withholding and other tax responsibilities under federal law.

The IRS has enumerated detailed factors, quite consistent with the common law factors considered by courts, for determining whether doctors are employees. For physicians practicing at a hospital, the IRS considers whether the physician has a private practice, is paid a wage, is provided supplies and support, is regulated/controlled by the hospital, works specified hours, wears a hospital uniform, has his or her services billed by the hospital, and splits fees with the hospital. Under this analysis, Dr. Cilecek would clearly qualify as an employee.[17]

In applying the IRS analysis, the court in *Dutch Square Medical Center Ltd. Partnership v. United States,*

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[17] In pertinent part, Ann. 92-83, 1992-22 I.R.B. 59, at 333.7(5) provides:

(a) The physician does not have a private practice.
(b) Hospital pays straight wage to physician.
(c) Hospital provides supplies and professional support staff.
(d) Hospital bills for physician services.
(e) Percentage division of physician fees with the hospital or vice versa.
(f) Hospital regulation of, or right to control physician.
(g) Physician on-duty at hospital during specified hours.
(h) Physician's uniform bearing hospital name or insignia.
(i) There are, of course, other factors that may indicate an employment relationship.

See also Rev. Rul. 61-178, 1961-2 C.B. 153 (physician integrated into hospital workforce deemed employee); Rev. Rul. 66-274, 1966-2 C.B. 446 (same).

94-2 U.S. Tax Cas. (CCH) ¶ 50,490, (D.S.C. 1994), upheld the IRS's determination that a medical director of an emergency medical care facility, though designated by contract as an "independent contractor," was an employee. The court analyzed in detail the common law and case law factors, and concluded that the doctor was fully integrated into the hospital work force with a "substantial amount of authority," and was its employee. *See also Idaho Ambucare Ctr., Inc. v. United States,* 57 F.3d 752 (9th Cir. 1995) (holding that two doctors were employees, one of the hospital, and the other of a professional corporation); *James v. Commissioner,* 25 T.C. 1296, 1301 (1956) (holding that a hospital pathologist was an employee because he was subject to the "general control of the hospitals" over his work and the "controls over his method of working" required by his profession).

Finally, it must be noted that the Fourth Circuit's constriction of the class of persons covered by Title VII will, in today's workplace, likely be most detrimental to workers most in need of the statute's protections. As the government noted in its *amicus* brief below, "increasingly, employers rely on persons who are labeled 'contractors' to accomplish tasks previously performed by full-time employees," and that "misclassification of employees as 'independent contractors' is a widespread occurrence." (Amicus Brief on Appeal at 20, n.17.) Furthermore, the Fourth Circuit's decision threatens to destabilize working relationships between health care professionals and their employers, thereby adversely affecting the people they serve.

During the last decade, increased economic competition has led American business to restructure

its relationship to workers. Indeed a "contingent workforce" composed of part-time workers, temporary workers, independent contractors, and workers employed by contractors has developed. *See* Richard S. Beloris, *The Contingent Economy: The Growth of the Temporary, Part-time and Subcontracted Workforce* (1989); Bureau of Labor Statistics, U.S. Dep't of Labor, Report 900, *Contingent and Alternative Employment Arrangements* (Aug. 1995); Eileen Silverstein and Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 Stetson L. Rev. 1 (1996). Estimates are that between one-quarter and one-third of employed Americans belong to that contingent work force, which now includes lawyers, doctors, maintenance workers, data processors, and architects, among others. Silverstein & Goselin, *supra*, at 1 (citing Beloris, *The contingent Economy; The Growth of the Temporary Part-Time and Subcontract Workforce* (1989)). In large part, businesses have developed this workforce to reduce labor costs and to avoid existing legal and customary constraints. *See generally*, Comment, *On the Clock Versus on the Books: The Appropriate Method for Counting Employees Under Tile VII, the ADEA and other Labor Laws*, 44 Buffalo L. Rev. 963, 964 (1996).

This trend has reconfigured the American workplace and the number of contingent workers continues to grow. Contingent workers are often precluded from participation in employer sponsored benefits programs and are often unprotected by statutes intended to provide labor protection. Disturbingly, contingent workers are often the very racial, ethnic, or gender minorities in need of those protections. *See* Beloris, *supra*. As Silverstein and Goselin, *supra*, at 2, point out: "Involuntary part-time and temporary workers include disproportionate

numbers of white females and African-American workers, . . . contingent employment moves a considerable number of workers who were already experiencing significant differentials in wages, benefits and employment opportunities into relationships where the projects are even more bleak . . . ."

Workplace protection mandated by federal law is unfortunately still needed for racial minorities and women, and, increasingly, for persons with disabilities. The Fourth Circuit's shorthand approach to this fact-intensive question allows employers to circumvent these laws and could spur the development of a class of workers that function as "employees" but are called "independent contractors" and are therefore denied the protections of all of these laws. Permitting employers to make arrangements with workers, as happened in the instant case, whereby workers can inadvertently waive their rights to protection under federal remedial statutes is contrary to the law of this Court and contrary to the purposes for which Congress enacted this legislation. There is thus an urgent need for this Court's resolution of this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.